

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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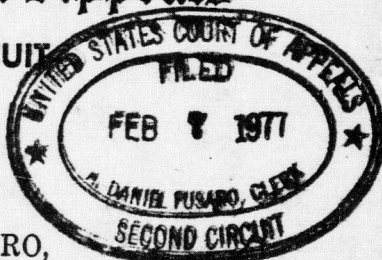
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To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6004



JOSEPH W. DiSILVESTRO,

Plaintiff-Appellant,

—against—

UNITED STATES VETERANS ADMINISTRATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND ADDENDUM FOR DEFENDANT-APPELLEE

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—against—

UNITED STATES VETERANS ADMINISTRATION,
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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal by Joseph W. DiSilvestro, plaintiff below, from a final order of the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch.J.*) summarily dismissing plaintiff's complaint on the grounds that (1) it is barred by the doctrine of res judicata insofar as plaintiff once again challenges the validity of the forfeiture of his veterans benefits pursuant to 38 U.S.C. § 3503, and (2) the defendant Veterans Administration was entitled to judgment as a matter of law on plaintiff's constitutional challenge to 38 U.S.C. § 211(a), the so-called "no review" clause. The unreported memorandum decision and order of the district court, dated November 26, 1976, is set out at pages 1-4 of the "appendix" annexed to plaintiff-appellant's brief on this appeal.

Issues Presented For Decision

Was the district court correct in holding that plaintiff's claim for review of the validity of the forfeiture of his veteran's benefits is barred by the doctrine of *res judicata*?

Is 38 U.S.C. § 211(a) unconstitutional? (The court below held in the negative.)

Statement of the Case

1. Factual Background

The background facts and circumstances relevant to this appeal are set forth in the memorandum of decision filed below by Chief Judge Mishler and in this Court's related opinion in *DiSilvestro v. United States*, 405 F.2d 150, 152 (1968), *reversing* 268 F. Supp. 516 (E.D.N.Y. 1966) (Mishler, J.)

2. Proceedings Below

Plaintiff filed his complaint, No. 76 C 1167, on June 22, 1976, seeking a judgment (1) declaring the forfeiture of his veterans benefits null and void, (2) declaring 38 U.S.C. § 211(a) unconstitutional, and (3) ordering the defendant agency to reinstate plaintiff's entitlement to the forfeited benefits.

At plaintiff's request, the district court entered an order requiring the defendant to appear on July 16, 1976 to show cause why plaintiff should not get an "early hearing" on his claims. Counsel for the defendant did so appear and advised the court that the defendant had no objection to summary disposition of plaintiff's

claims; the court below then directed that formal reply papers be filed within thirty days (*i.e.*, by August 15, 1976, a Sunday).

On or about August 9, 1976, plaintiff filed amendments to his complaint, in substance enlarging his earlier prayer for injunctive relief.

On Monday, August 16, 1976, counsel for defendant timely¹ served and filed an affidavit in reply to plaintiff's complaint, setting forth the defendant's arguments in support of its position that the complaint failed to state a claim for which the district court could grant relief; specifically, that plaintiff's claim for substantive review of the forfeiture of his benefits was barred by the doctrine of *res judicata*, as well as 38 U.S.C. § 211(a) itself, and that plaintiff's constitutional claims were frivolous in light of *Johnson v. Robison*, 415 U.S. 361 (1974), *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972), and *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965).

The reply affidavit also pointed out that neither of plaintiff's alleged jurisdictional bases—the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*—conferred subject matter jurisdiction on the district court in the circumstances of this case, citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), and 5 U.S.C. § 701(a)(1), respectively, and that the defendant agency is not a suable entity, citing *Mitchell v. United States*, 111 F. Supp. 104, 105 (D.N.J. 1952).²

¹ See F. R. Civ. P. 6(a).

² The opinion below did not deal with these issues and, in our view, it would serve no purpose to brief or argue them on this appeal.

3. The Decision Below ("Appendix", pp. 1-4)

In denying plaintiff's claim challenging the forfeiture of his veterans benefits, Chief Judge Mishler specifically noted that plaintiff has unsuccessfully litigated the instant and related claims no fewer than *eleven* times since 1949. Therefore, Judge Mishler held plaintiff's challenge to the validity of the forfeiture barred by the doctrine of *res judicata*, citing specifically to *DiSilvestro v. United States Veterans Administration*, 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir. 1956), *cert. denied*, 350 U.S. 1009 (1956); *Id. v. Id.*, 151 F. Supp. 337 (E.D. N.Y. 1957), *application to proceed in forma pauperis denied without opinion*, No. 17322 (2d Cir., 1958), *cert. denied*, 355 U.S. 968 (1958), and *DiSilvestro v. United States*, 181 F. Supp. 860 (E.D.N.Y. 1960), *aff'd without opinion* (2d Cir. 1960), *cert. denied*, 364 U.S. 825 (1960).

The district court succinctly characterized plaintiff's challenge to the constitutionality of 38 U.S.C. § 211(a) as "without merit", inasmuch as it is well established that Congress may legislate to bar judicial review of Veterans Administration adjudications on claims, such as plaintiff's, for noncontractual benefits, citing *De Rodulfa v. United States*, *supra*, and *Milliken v. Gleason*, *supra*.

Judgment was accordingly entered in favor of defendant and against plaintiff, dismissing the complaint.

[Following dismissal of this action, plaintiff applied to the district court for permission to appeal *in forma pauperis*. On January 6, 1977, Judge Mishler summarily denied this application, bluntly characterizing plaintiff's claims as "entirely frivolous." See Memorandum of Decision and Order, dated January 6, 1977, reproduced *infra* at Addendum 1a.]

4. Principal Contentions of the Parties

We assume that plaintiff contends that the district court erroneously relied on the doctrine of *res judicata*, although his brief is not especially clear on this point. In this regard, he appears to maintain that the issue of his right to the forfeited benefits has never been adjudicated.

Plaintiff also seems to argue that the Veterans Administration decision to forfeit his benefits was actually a criminal proceeding, and could not be effected without a trial by jury and other "due process" protections. Thus, in plaintiff's view, it is unconstitutional for Congress to bar judicial review of the administrative decision to forfeit his benefits.

The government contends that the district court correctly dismissed plaintiff's first claim as barred by the doctrine of *res judicata* inasmuch as both the district court and this Court have on a number of occasions held identical claims by plaintiff barred by 38 U.S.C. § 211(a).

We also submit that plaintiff's constitutional challenge to § 211(a) was correctly dismissed by Judge Mishler in light of *Johnson v. Robison*, 415 U.S. 361 (1974), and the cases relied upon by the court below.

A R G U M E N T

POINT I

The District Court correctly held plaintiff's claim for review of the forfeiture of his veterans benefits barred by the doctrine of *res judicata*.

For a judgment in a prior action to be a bar to reaching the merits of a subsequent action, it is firmly established that the prior judgment must have been rendered by a court of competent jurisdiction, must have been a final judgment on the merits, and that the same causes of action and the same parties or privities must have been involved in both suits. *Herendeen v. Champion Intern. Corp.*, 525 F.2d 131, 133 (2d Cir. 1975), and cases cited therein at n. 3.

Moreover, when a plaintiff, in his second suit, merely advances a ground for relief which *could have been* asserted in a prior action between the same parties with respect to the same underlying claim, the subsequent suit remains barred by the doctrine of *res judicata*, notwithstanding the assertion of "new" grounds for relief. *Herendeen, supra*, at 134 n.8.

In the case at bar, the district court correctly pointed out that plaintiff's claim for relief *vis-a-vis* the forfeiture of his veterans benefits has been held barred by 38 U.S.C. § 211(a) by both the district court and this court on a number of different occasions. See, e.g.: *DiSilvestro v. United States Veterans Administration*, 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir. 1956), *cert. denied*, 350 U.S. 1009 (1956); *Id. v. Id.*, 151 F. Supp. 337 (E.D.N.Y. 1957), *application to proceed in forma pauperis denied without opinion*, No. 17322 (2d

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Accordingly, we submit that the district court correctly held that plaintiff's present claims with respect to the validity of the forfeiture of his veterans benefits are barred by the doctrine of *res judicata*.³

POINT II

The District Court correctly held Section 211(a) constitutional.

In *Johnson v. Robison*, 415 U.S. 361 (1974), Justice Brennan traced the history of the "no-review" clause, 38 U.S.C. § 211(a), in some detail, pointing out that there is "clear and convincing" evidence of a Congressional intent to preclude judicial review of final decisions of the

³ We note that should the Court conclude that the doctrine of *res judicata* is not *technically* applicable to this case in light of the "jurisdictional" nature of the prior dispositions of plaintiff's suits, *but see American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932) (Brandeis, J.: "[t]he principles of *res judicata* apply to questions of jurisdiction as well as other issues"), plaintiff's substantive claims in the case at bar are, of course, also barred by 38 U.S.C. § 211(a), the "no-review" clause. *DiSilvestro v. United States Veterans Administration*, *supra*, 228 F.2d 516 (2d Cir. 1956), *aff'g* 132 F. Supp. 692 (E.D.N.Y. 1955); *see, also, DiSilvestro v. United States*, 405 F.2d 150, 153 (2d Cir. 1968).

In addition, since plaintiff has, in fact, received substantive review of the forfeiture, albeit in the context of a challenge to a set-off against his National Service Life Insurance dividends, *see DiSilvestro v. United States*, *supra*, and fn. 4, *infra*, we submit that he is collaterally estopped from relitigating the validity of the forfeiture anew in his present action.

Administrator of Veterans Affairs such as the forfeiture complained of by plaintiff. 415 U.S. at 371-374.

"Clear and convincing" evidence is, of course, the necessary prerequisite to upholding such a barrier to judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

In light of *Johnson v. Robison*, *supra*, we submit that the district court was eminently correct in its determination that plaintiff's challenge to the constitutionality of § 211(a) is "without merit" and "entirely frivolous", especially given the decisions in *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972); *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1965), *cert. denied*, 379 U.S. 1002 (1965), and *Sager v. Johnson*, 342 F. Supp. 351 (D. Md. 1972), all of which were expressly relied upon in the opinion below.⁴

⁴ It must also be pointed out that in *DiSilvestro v. United States*, 405 F.2d 150 (2d Cir. 1968) (Kaufman and Anderson, *CJJ.*, and Tenney, *DJ.*), in which this Court concluded that the forfeiture of which plaintiff complains was subject to judicial review in a suit challenging a set-off against National Service Life Insurance dividends due plaintiff, *the forfeiture was ultimately upheld by the district court on remand* in an unreported decision dated March 24, 1969 (Mishler, J.), which plaintiff chose not to appeal.

Accordingly, we submit that plaintiff's constitutional challenge to the forfeiture is truly "without merit" since, in any event, it has been judicially determined that he was treated fairly by the Veterans Administration.

CONCLUSION

For the reasons stated above, the decision appealed from should be affirmed.

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Deborah R. Linfield in the preparation of this brief. Ms. Linfield is a second year student at the New York University School of Law.

ADDENDUM

Memorandum of Decision and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
76 C 1167

JOSEPH DiSILVESTRO,

Plaintiff,

—against—

UNITED STATES VETERANS ADMINISTRATION,

Defendant.

January 6, 1977

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MISHLER, CH. J.

The plaintiff's motion for an order to proceed *in forma pauperis* on appeal to the Second Circuit is denied. The claim he seeks to have reviewed is entirely frivolous. It is

SO ORDERED.

The Clerk of the Court is directed to forward a copy of this memorandum of decision and order to the plaintiff.

JACOB MISHLER

U. S. D. J.